BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the United States District Court (R. 71-80) has not yet been officially reported.

The opinion of the Circuit Court of Appeals (R. 86-91) has not yet been officially reported.

Statement

The material facts are set forth in the petition at pages 2-3.

Jurisdiction

The jurisdiction of this Court to grant the writ prayed for is set forth in the petition at page 3.

Statutes Involved

The statutes involved are Title 18, Sections 611-626, U. S. C. A., and the Fourth Amendment to the Constitution of the United States.

Specification of Errors

The errors which petitioner will urge if the writ of certiorari is allowed are that the Circuit Court erred:

1. In holding that the search warrant of April 13, 1942, issued upon probable cause as required by the Fourth Amendment and by Title 18, Sections 613 and 615, U. S. C. A.

2. In holding that the warrant and the supporting affidavits described the property to be seized with sufficient particularity within the meaning of Title 18, Section 613, U. S. C. A., and the Fourth Amendment.

3. In failing to hold that the evidence upon which the search warrant of April 13th was based stemmed from evidence illegally seized and, therefore, was incompetent and could not be used in any fashion, under the decision of this Court in *Silverthorne Lumber Co.* v. *United States,* 351 U. S. 385.

4. In affirming the order of the United States District Court denying the petition for the return of goods seized under a search warrant and for the quashing of the warrant, and denying the absolute right to a hearing in accordance with Title 18, Section 625, U. S. C. A.

Summary of Argument

The warrant of April 13, 1942, and the affidavits upon which it issued did not particularly describe the goods to be seized and did not justify a finding of probable cause in accordance with the express requirements of the Fourth Amendment and Title 18, Sections 613 and 615, U. S. C. A.

Furthermore, the evidence derived from the examination at the warehouse where the property had been removed pursuant to the writ of replevin, and upon which the warrant of April 13, 1942 issued, was illegally obtained and stemmed from the original illegal search and seizure.

ARGUMENT

POINT I

The facts contained in two of the six affidavits (Behrens and Rimar, R. 43-46, 48-51) upon which the warrant issued were derived from evidence previously illegally seized by Government agents and, therefore, were not competent.

The opinions of both the Circuit Court (R. 86-91) and the District Court (R. 71-80) revolve around the question of the competency as evidence of the facts in these two affidavits, the one by negative inference (i. e., the Circuit Court), the other by direct imprecation.

The Circuit Court skirts the question of the illegality of the information secured at the warehouse and rests its findings as to the validity of the warrant upon those affidavits which were not based upon the evidence secured at the warehouse. The position of the Circuit Court is epitomized as follows: "* * * the additional information obtained at the warehouse was not necessary to the validity of the search warrant * * *" (R. 91).

The District Court stands definitely committed to the proposition that the validity of the warrant and the competency as evidence of the facts in the two affidavits based upon the examination in the warehouse are interdependent. It holds that the facts in the affidavits of Behrens (R. 43-46) and Rimar (R. 48-51) were legally obtained, *ergo* the warrant was valid.

The facts in the affidavit of the Assistant United States Attorney Behrens (R. 43-46) and in a portion of the affidavit of Rimar (R. 48-51) were derived from the examination at the warehouse. The examinations were illegal. They were in direct conflict with the prohibition of this Court against the use in any way of illegally obtained evidence (*Silverthorne* v. *United States,* 251 U. S. 385, 40

S. Ct. 182, 64 L. Ed. 319). The examinations were made possible by an indirect use of the evidence previously illegally seized and ordered to be returned.

The Federal Bureau of Investigation being in possession of evidence (which the Government confesses to have been secured by illegal search) before the date set for the return of this illegally seized evidence supplied that information to the attorney for the Ford Motor Company and he, thus armed, secured the seizure of the property by the New York Deputy Sheriff. The property having been placed in friendly hands at the initiative of the Government, the examination of the goods by the Government was now made possible. Mr. Behrens and Mr. Rimar by reason of the act complained of were permitted to accomplish by indirection that which could not be done directly. For concededly they could not have entered the premises of the petitioner to make the exploratory search made herein, if the goods had remained in its custody on its premises.

It is submitted that the evidence, the use of which was interdicted, could not thus become admissible by a transparently collusive arrangement.

As this Court has pointed out, "the essence of a provision forbidding the acquisition of evidence in a certain way is that * * * evidence so acquired * * * shall not be used at all". *Silverthorne Lumber Company* v. *United States,* supra.

In *Nardone* v. *United States,* 308 U. S. 338, 340, this Court, in discussing the indirect use of evidence obtained by prohibited means, said: "to forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty' ".

POINT II

Disregarding the considerations of illegal taint, the facts in the affidavits of the Assistant United States Attorney and of Rimar were not sufficient to satisfy the requirements of the Fourth Amendment and of Title 18, Section 613, U. S. C. A., as to probable cause and particularity of description of the property to be seized.

The facts in the affidavit of Rimar (R. 48-51) did not pretend to describe the parts to be seized but merely alleged that examination at the warehouse of *some* of the parts revealed that some of the parts had been shipped by him to petitioner. There is no attempt to identify the small portion of the parts examined by Rimar at the warehouse on April 11, 1942, with the parts described in the schedule (attached to his affidavit) which he alleged were shipped to the petitioner prior to November, 1941.

Edward J. Behrens, Assistant United States Attorney, who examined some of the merchandise with Rimar at the warehouse on April 11, 1942, asserts in his affidavit annexed to the search warrant: "Deponent did not see all of them" (R. 45) (i. e., the boxes and cartons involved). His affidavit states that he examined *some* of the parts contained in a *few* cartons and boxes. He asserts that he did not examine the 364 cartons and 27 wooden boxes and their contents seized pursuant to the search warrant. There could, therefore, have been no factual basis for the statement in the warrant, and, indeed, there was none in the affidavits of Behrens and Rimar, that all of the goods *seized* had been used as the means of committing a felony and had been shipped from one state to another.

This Court has held that search and seizure is a radical remedy and the Government must be held to strict accountability. There cannot be perfunctory or random inspection of a part of the whole to justify seizure of the whole, particularly where some of the goods might never have been involved in the commission of a crime.

POINT III

The remaining four affidavits which [redacted] the Circuit Court held justified the issuance of the search warrant of April 13, 1942, dealt with facts existing before November, 1941, and therefore did not support a finding of probable cause on April 13, 1942. As a result the warrant issued in violation of the Fourth Amendment and Title 18, Section 613, U. S. C. A.

The Circuit Court in its opinion (R. 86-91) bases the validity of the search warrant in question upon those affidavits, the facts of which were not derived from information secured at the warehouse. It states "* * * the additional information obtained at the warehouse was not necessary to the validity of the search warrant * * *" (R. 91) [i. e., the affidavit of the Assistant United States Attorney (R. 43-46) and at least that part of the affidavit of Rimar (R. 48) based on information secured at the warehouse, were unnecessary to establish probable cause].

This leaves to be considered only that portion of the affidavit of Sol Rimar not based on information secured at the warehouse (R. 48-49, through third paragraph); the affidavit of John J. Herman (R. 52-54); the affidavit of Sol Lewis (R. 54); the affidavit of Edward J. Kennedy (R. 55-56); the affidavit of Norman G. Temple (R. 46-48).

An examination of each of the above affidavits reveals that the last date of which any affiant speaks is November, 1941. The warrant (R. 41-52) issued on April 13, 1942. This was approximately five months after the time to which the affidavits refer.

This Court has pointed out that

> "While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the *proof must be of facts so closely related to the time of the issue of*

the warrant as to justify a finding of probable cause at that time." (Italics ours.) *Sgro* v. *U. S.*, 287 U. S., 206, 210.)

If the facts stated in the affidavits are to be regarded as proof, they are only proof of the existence of facts up to November 14, 1941. The warrant issued on April 13, 1942. It is submitted that the facts said to be existing up to November 14, 1941, were not facts "so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time" that all of the merchandise then in the possession of this petitioner was property which had been used as the means of committing a felony and had been shipped in interstate commerce (Title 18, Section 612 [2] U. S. C. A.).

POINT IV

The warrant and supporting affidavits do not particularly describe the goods in the possession of this petitioner to be seized and therefore the warrant issued in violation of the Fourth Amendment and Title 18, Section 613, U. S. C. A.

The Circuit Court in stating that the particularity of description in the affidavit and warrant was sufficient confines itself to the affidavits not based on ~~information~~ examination at the warehouse. It states that "a description of the type of parts, the style of box shipped in, etc., which could easily have been supplied without examination in the warehouse, would have been a satisfactory description to meet the requirements of the search warrant statute" (R. 90).

The Circuit Court supports this position, by citing the following seven cases: *United States* v. *Klaia,* 2 Cir., 127 F. (2d) 529; *Steele* v. *United States* (No. 1), 267 U. S. 498, 504, 45 S. Ct. 414, 69 L. Ed. 757; *Nuckols* v. *United States,* App. D. C., 99 F. (2d) 353, certiorari denied 305 U. S. 626, 59 S. Ct. 89, 83 L. Ed. 401; *Johnson* v. *United States,* 6 Cir.,

46 F. (2d) 7; *Rose* v. *United States,* 8 Cir., 45 F. (2d) 459; *United States* v. *Edwards,* D. C. E. D. Mich., 296 F. 512; *United States* v. *Fitzmaurice,* 2 Cir., 45 F. (2d) 133, 134.

A careful examination reveals that all of the cases cited by the Circuit Court deal with the particularity of description required where *contraband* is involved and not stolen property.

The case of *Nuckols* v. *United States,* supra, cited by the Circuit Court, makes the following distinction:

> "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods."

The Circuit Court of Appeals, Fourth Circuit, in the case of *Elrod* v. *Moss,* 278 F. 124, 129, points out the distinction between contraband and stolen property:

> "Intoxicating liquors are made in so many forms and transported in so many different sorts of packages that, if the same particularity of descriptive identification were required *as in the case of stolen goods,* professional criminals who engage in the traffic would have practical immunity. * * * *In warrants for search and seizure of stolen goods particularity of description is necessary to the protection of the citizen from the seizure of other goods of the same character, his lawful property.* The protection of the rights of the accused do not require that the Constitution be construed to exact the same degree of particularity of description in search warrants for contraband liquors, because *there is no right of property in contraband* liquor, and there can be no danger to the citizen of being deprived of property which he is lawfully entitled to hold against the state." (Italics ours.)

The danger and injustice of the type search made in the instant case upon such vague and loose papers is emphasized by the fact that thousands upon thousands of automobile parts were seized from the possession of this petitioner. The petitioner has been in the parts business for approximately eleven years, and has been purchasing from

over two hundred dealers of unquestionable reputation. The seizure was wholesale and wanton without any regard to "other goods of the same character, his lawful property". *Elrod* v. *Moss*, supra.

The Supreme Court of Illinois, in *People* v. *Prall*, 314 Ill. 518, 522-523, 145 N. E. 610, in discussing the requirements for particularity of description under the provision of the Illinois Constitution, which is exacty modelled on the Fourth Amendment of the Constitution of the United States, points out in a case similar to this, that in the case of stolen goods the description must be sufficiently detailed to identify the articles to be seized. It is interesting to note that the property illegally seized in that case was also automobile parts. That Court aptly pointed out the danger that might result to legitimate private propery owned by the accused if a seizure were allowed on the basis of a general description.

It is clear that the Circuit Court overlooked the distinction between stolen property and contraband (narcotics, illicit alcohol, etc.) in which there is no property right.

In this case, if we consider only those affidavits which the Circuit Court thought sufficient to support particularity, we do not find a single allegation that petitioner had knowledge of any illegality concerning the merchandise seized and we have remaining only the following:

(1) That part of the affidavit of Sol Rimar which states that he had shipped between 1940 and November, 1941, certain stolen property to this petitioner, giving a list of the same (R. p. 48). There was no allegation that such property was in possession of this petitioner on April 13, 1942, the date of the making of the affidavit, nor anything to explain the gap of five months.

(2) The affidavit of Norman G. Temple (R. 46-48), a Special Agent of the Federal Bureau of Investigation, to the effect that as the result of the examination of records of the Ford Motor Company, for the period between January

and June 30, 1941, a shortage was revealed in eleven specified parts. There was no allegation that these parts were in the possession of petitioner on April 13, 1942, the date of the making of the affidavit, nor anything to explain the gap of nine and one-half months.

(3) The affidavit of John Herman (R. 52-54) to the effect that he was a partner of Sol Lewis, and that the partnership had sold enumerated parts for a year previous to November, 1941, to this petitioner which had been purchased by the partnership from employees of the Ford Motor Company, which had come into their possession by theft or embezzlement. There was no allegation that parts sold to petitioner were in its possession on April 13, 1942, at the time of the making of the affidavit, nor anything to explain the gap of five months.

(4) The affidavit of Edmund J. Kennedy (R. 55-56), a Special Agent of the Federal Bureau of Investigation, to the effect that an investigation by him of the records of named shipping companies for periods up to September 20, 1941, had revealed that a certain number of shipments of merchandise (the character of the merchandise not being revealed) had been made from Motor Supply Company, Detroit, Michigan, to this petitioner. There was no allegation that the property so shipped was in the possession of this petitioner on April 13, 1942, the time of the making of the affidavit, nor anything to explain the gap of almost seven months.

Not one of these affidavits attempted a particular description as required by the Fourth Amendment and Title 18, Section 613, U. S. C. A., of the goods then in the possession of this petitioner, which the Government sought to seize. The Circuit Court of Appeals held (Opinion, R. 90):

> "And a description of the type of parts, the style of box shipped in, etc., which could easily have been sup-

> plied without examination in the warehouse, would have been a satisfactory description to meet the requirements of the search warrant statute."

However, it is not likely that the Assistant United States Attorney would have gone to the trouble of making an examination in the warehouse if the proper description "could easily have been supplied without examination in the warehouse".

If we are to disregard Behrens' affidavit (R. 43-46) and a portion of Rimar's affidavit (R. 49, par. 4—R. 50) as suggested by the Circuit Court, not a single affidavit even remotely attempts to identify "the style of box shipped in". While the warrant calls for the seizure of a specified number of cartons and boxes used in the commission of a felony (R. 41-42), not one affidavit on which the warrant is based (R. 43-56) discloses any evidence indicating an examination of the specified number sought to be seized; nor is there a basis for the statement in the warrant that *all this property* was the subject matter of a felony and had been shipped in interstate commerce; nor is there an enumeration of the quantity "of the type of parts" sought to be seized.

CONCLUSION

For the reasons herein assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

IRVING R. KAUFMAN,
Attorney for Petitioner.